

2008

# The State of Utah v. Clay E. Reed : Brief of Appellant

Utah Court of Appeals

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Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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<b>THE STATE OF UTAH,</b>	:	
Plaintiff,	:	
vs.	:	
	:	Case No. 20080410-CA
<b>CLAY E. REED,</b>	:	
Defendant	:	

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Appeal from a Judgment of Conviction in the Eighth District Court,  
Duchesne County (Roosevelt Department)  
Hon. A. Lynn Payne, presiding

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**APPELLANT'S OPENING BRIEF**

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## JURISDICTION STATEMENT

Pursuant to U.C.A §78A-4-103(2)(e), the Utah Court of Appeals has jurisdiction of this matter, inasmuch as it is an appeal from a court of record in a criminal case not involving a conviction or charge of a first degree or capital felony.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the Defendant denied the effective assistance of counsel? Claims of ineffective assistance of counsel are subject to a two-prong analysis: (1) Whether counsel's performance was deficient, and (2) whether that performance prejudiced the defendant. Adams v. State, 123 P.3d 400, 406, 2005 UT 62, ¶25.

2. Was the Defendant denied critical materials necessary to mount an effective defense, contrary to U.C.A. §77-32-301? Public defense resources are subject to an abuse of discretion standard. State v. Carreno, 113 P.3d 1004, 1005, 2005 UT App 208, ¶7.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI, U.S. Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Article I, Section 12, Utah Constitution: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . ."

U.C.A. §77-32-301

## STATEMENT OF THE CASE

Mr. Reed was originally charged on September 16, 2007 with one count of Purchase, Transfer, Possession or Use of a Firearm by a Restricted Person, a Second Degree Felony, in violation of U.C.A. §76-10-503. 1-2. He was convicted by a jury on December 19, 2007. 72-74, 165. On April 9, 2008, he was sentenced to one to fifteen years in the Utah State Prison. 132-139. He is presently incarcerated.

The Notice of Appeal was originally filed on April 21, 2008. 140-141. That appeal was dismissed on May 22, 2008, for failure to file a docketing statement. On June 5, 2008, the Appellant moved to reinstate the appeal under Rules 23, and 23A of the Utah Rules of Appellate Procedure. The motion was granted on June 6, 2008.

## STATEMENT OF FACTS

On the evening of September 16, 2007, Mr. Reed and another man, together with Mr. Reed's girlfriend, Megan Bell, got a flat tire while in Roosevelt, in Duchesne County. The three set about knocking on doors at a housing complex looking for a jack to fix the tire. The two men approached a Mr. Martinez, who was visiting a friend. According to Mr. Martinez, Mr. Martinez got suspicious and went home to get a knife. When he came back, the man accompanying Mr. Reed became aggressive and pulled a gun on Mr. Martinez. Mr. Martinez was able to describe this gun in some detail. Mr. Martinez then put his

knife to the gunman's throat. Mr. Reed, who was standing a short distance behind the gunman, is then alleged to have pulled out some object, which may have been a part to a tire jack, but which the State maintains was a gun. 165, pp. 127-138, 153-159, 204-211.

Mr. Reed denies having had a gun, and none of the witnesses could describe the gun in any kind of detail. 165, pp. 204-211. Notwithstanding Mr. Martinez possessed only a knife, both Mr. Reed and the unidentified gunman promptly backed away from Mr. Martinez, then ran away. The two, together with Ms. Bell then drove away in the van with the flat tire. Police arrested Mr. Reed a short time later. The original assailant remains unidentified. No gun was ever seen or retrieved by the police. 165, pp. 173-201.

A public defender was appointed to represent the Defendant. 6-7. Although she was provided with Ms. Bell's witness statement, and was aware that Ms. Bell could corroborate Mr. Reed's testimony that he did not have a gun, the attorney failed to call Ms. Bell as a witness. Prior to trial, trial counsel moved the court to order the production of a number of items, which would have been very useful in undermining the State's witnesses. 21-35. However, although the trial court never ruled on the motions, trial counsel made no objections, asked for no continuance, and proceeded to trial without the benefit of any impeachment materials. To date, the trial court has still not ruled on any but one of the motions.



Mr. Reed stipulated at trial that he is a previously convicted felon (165, pp. 194-195), but was adamant that he was aware of the restrictions the conviction carried with it, and would not have carried a weapon under any conditions. 165, pp. 210-211. The jury deliberated for two hours. Although the jury ultimately convicted Mr. Reed, they did not do so without first contacting the trial judge regarding a possible deadlock. 165, p. 244.

#### SUMMARY OF ARGUMENTS

I. The critical issue before the jury was whether or not Mr. Reed possessed a gun. Prior to trial, trial counsel requested a number of items for the ostensible purpose of impeaching the State's evidence. However, after motioning the trial court to order production of the materials, trial counsel entirely abandoned any effort to obtain them. Mr. Reed was denied the use of these materials, and thereby denied effective representation.

II. The police reports and witness statements make clear that Mr. Reed's girlfriend was present, and could have verified Mr. Reed's own testimony that he had no gun. Yet, inexplicably, trial counsel failed to call Ms. Bell as a witness. It is clear that trial counsel's performance was deficient in failing to call Ms. Bell, and it is equally clear that Mr. Reed's defense was prejudiced by this deficiency.

III. Although trial counsel properly requested a number of items essential to Mr. Reed's defense, the trial court failed to rule on those motions prior to trial, and indeed,

has never ruled on those motions at all. Mr. Reed was thus denied the means to make an effective defense, in violation of U.C.A. §77-32-301.

## ARGUMENT

### **I. Mr. Reed was denied the effective assistance of counsel.**

Counsel is deemed ineffective by constitutional standards if his performance both falls below an objective standard of reasonableness and prejudices his client. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Adams v. State, 123 P.3d 400, 406, 2005 UT 62, ¶25. Ineffective assistance of counsel must be understood under the specific circumstances of this case. The issue is not whether Mr. Reed was present, nor whether he was a restricted person, nor even whether the unidentified man pulled a gun, but merely whether Mr. Reed pulled a gun. Accordingly, the most dispositive evidence would be that tending to prove or disprove that he had a gun. Trial counsel was well apprized that the State would present the following evidence:

1. The eyewitness testimony of Orlando Martinez that Mr. Reed pulled a gun;
2. The eyewitness testimony of Joseph Houlihan that Mr. Reed pulled a gun; and
3. Police Chief Rick Harrison's testimony that he found a .45 caliber bullet and a gun-cleaning kit in the vehicle Mr. Reed was riding in.

In opposition to these witnesses, trial counsel potentially had available:

1. The eyewitness testimony of Megan Bell, Mr. Reed's girlfriend, that Mr. Reed did not have a gun (Addendum);
2. Mr. Martinez's testimony from the preliminary hearing which contradicted his trial testimony in certain details, thus reflecting on his credibility (163, pp. 11, 22; 165, pp. 131, 147);
3. The criminal histories of Mr. Martinez and Mr. Houlihan, potentially impugning the witnesses' credibility;
4. Fingerprint evidence refuting any connection between Mr. Reed and the .45 caliber bullet;
5. Dispatch tapes refuting Mr. Houlihan's statements to the 911 operator; and
6. A private investigator to locate potential defense witnesses.

Notwithstanding the availability of all these resources, as acknowledged by her own motions (21-35), trial counsel only availed herself of the criminal histories. As to the rest, Mr. Reed was denied the effective assistance of counsel.

A. Trial counsel failed to request a continuance so as to be able to obtain requested materials and witnesses necessary to impeach the State's evidence. On November 1, 2007, a trial date was set for December 19, 2007. On December 3, 2007, trial counsel filed motions under U.C.A. §77-32-301 requesting the production of a transcript of the

preliminary hearing, criminal histories of the prosecution witnesses, fingerprinting of the bullet and gun-cleaning kit found in the vehicle, copies of the dispatch tapes, and the hiring of a private investigator. Due to the late date, she also requested that these matters be expedited. 21-35. So far, so good.

Unfortunately, except for the criminal histories of the witnesses, which the court ordered to be provided (57-58), trial counsel took no further action on the motions. She made no request that they be acted on before trial, nor did she request that trial be continued in order to obtain them. In effect, she abandoned the motions, apparently for no good reason. Trial counsel's own motions acknowledge that the materials were necessary to address the critical issue of whether or not Mr. Reed possessed a gun. Requesting the materials certainly satisfied an objective standard for effective defense. Abandoning those requests defied that standard. Mr. Reed was thus denied the effective assistance of counsel in mid-flight.

B. Trial counsel failed to call a critical exculpatory witness. All of the witnesses agreed that a young lady was present together with Mr. Reed and the unidentified gunman (163, p. 12; 165, pp. 135, 138, 141-142, 146, 148, 155, 160-161, 177, 189, 192, 204-205, 207-210, 212, 215-216), and in contrast to the unidentified gunman, Ms. Bell provided her name and a witness statement. Addendum. It is also clear that trial counsel

knew of her and intended to call her as a witness. 165, p. 11. Defense counsel should have made the effort to subpoena this key witness. Instead, counsel apparently relied upon the State's list of proposed witnesses (45-46). Ideally, she would have checked with the State prior to trial to ensure the witness was subpoenaed. Instead, as is apparent from the transcript, she merely remained hopeful that Ms. Bell would show up without having been subpoenaed. 165, p. 11. At the very least, when trial counsel learned that the State had not subpoenaed Ms. Bell, counsel should have objected and requested a continuance.

The failure to obtain at least one corroborating eyewitness or any materials to impeach the State's witnesses cannot be written off as mere harmless error. Approximately two hours into deliberation, the jury queried "Is a hung jury an option?" 165, p. 244. Clearly the guilt or innocence of the defendant was still a close question at that point. Ms. Bell's testimony to corroborate Mr. Reed's that he had no weapon, or positive evidence that Mr. Reed's fingerprints were absent from either the .45 bullet or the gun-cleaning kit, or the discrepancies between Mr. Martinez's statements at the preliminary hearing versus at trial, or discrepancies between Mr. Houlihan's statements to the 911 operator as compared to his trial testimony, could each have pushed the potentially hung jury in the opposite direction from which it went. Collectively, there is little doubt they would have led to a different outcome.

**II. The trial court effectively denied Mr. Reed the materials necessary to impeach the State's evidence.**

U.C.A. §77-32-301

Each county, city, and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

...  
(3) provide the investigatory materials necessary for a complete defense

To the extent trial counsel filed the correct motions, the trial court abused its discretion in failing to act upon those motions. Granting or denying a motion may fall within the broad discretion of the trial court, but failing to act does not. This is especially so, where, as here, belated though they may have been, counsel went so far as to file Requests to Submit for Decision. 102-109.

Rule 12(e) of the Utah Rules of Criminal Procedure states: "A motion made before trial *shall* be determined before trial unless the court for good cause orders that the ruling be deferred for later determination." (Emphasis added). The trial court did not have discretion not to rule on the defense's motions. Taken together with the extent to which Mr. Reed was handicapped in his defense by not having the requested materials, the trial court's failure to rule on Mr. Reed's motions constitutes an abuse of discretion warranting a new trial.

## CONCLUSION

You don't bring a knife to a gun fight, and there's little point in having a gun if you're going to run at the sight of a knife. Under most circumstances, Mr. Martinez would have been charged with assault. Instead, Mr. Reed was charged with possession of a weapon he maintains he did not possess. The only reason Mr. Reed was not able to effectively lay that issue before the jury was that he was denied the witnesses and materials necessary to do so. Regardless of whether that denial was due to the ineffectiveness of counsel or abuse of discretion by the trial court, Mr. Reed's conviction should be vacated and he should be granted a new trial.

DATED this 7<sup>th</sup> day of August, 2009.

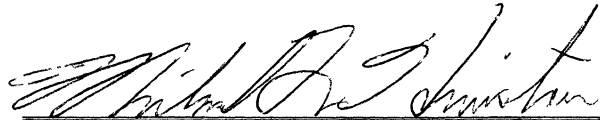
A handwritten signature in cursive script, appearing to read "Michael L. Humiston", written over a horizontal line.

Michael L. Humiston  
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellant's Opening Brief were mailed to the following this 7<sup>th</sup> day of August, 2009.

Kris C. Leonard  
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Michael L. Humiston



# ADDENDUM



**Roosevelt City Police Department**  
**Statement of Witness**

Date: Sept 16 2007 Time: 1:30 Place: 255 S. State  
I, Meghan, I live at Box 181 White Rocks UT 84005, 200W. SLC  
I am giving this statement to \_\_\_\_\_, who has identified himself as a  
Police Officer. I understand that statements I make to the officer or put in this voluntary  
statement may be presented to a magistrate or a judge in lieu of my sworn testimony at a  
preliminary examination. Any false statement I make and that I do not believe to be true may  
subject me to criminal punishment as a class A misdemeanor.  
Phone: 353-470 D.O.B: 2/3/84 SS#: 528-55-7908

84104

Statement:

We was all at a party and me & Clay were  
leavin n this boy asked us for a ride so  
we said yeah so we came to Roosevelt.  
n we had a flat tire so I asked the Mexican  
Guy if he had a jack n he said no so I  
walked further down n started knocking  
a different door then I heard yelling so I  
when I turned around and looked  
everybody was yelling so I got scared n  
drove off n found a spot to park n asked  
if anybody had a jack then my mom,  
sister - n - Clay pulled up then the  
cop pulled up a little later

The Guy was wearin a white t-shirt shorts  
n something n slippers bald medium build big lips!

I have read this statement consisting of \_\_\_\_\_ page (s), each page of which bears my  
signature, and I do affirm that all facts and statements contained herein are true and correct.

\_\_\_\_\_  
Witness

Meghan A Bell  
Signature of person making voluntary statement